



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Appeal 75 of 2001

LEVI BUDINGA JOTHAM :::::::::::::::::::: APPELLANT

VERSUS

MUSA LWIGADO :::::::::::::::::::: RESPONDENT

JUDGEMENT

The Appellant, LEVI BUDINGA JOTHAM, seeks the setting aside of the decision made by the Provincial Appeals Committee on 22nd May 2001, in Case No. 78 of 1998.

It is his contention that the appeals committee had erred, when it allowed the appeal challenging the decision of the Vihiga Land Disputes Tribunal, in case No. 50 of 1998. Therefore, the appeal wishes to have the decision of the Vihiga Land Disputes Tribunal reinstated.

The following are the grounds of the appeal herein;

“1. The Appeals Tribunal erred in law by failing to

establish the basis or reasons for its decision.

2. The Appeals Tribunal erred in law by allowing for further evidence to be taken without reason or any sound reason.

3. The Appeal Tribunal erred in law by failing to find that the sale of Land in question was subject to a Consent of the Land Control Board, and that the Consent, if any, had been irregularly obtained.”

When canvassing the appeal, the appellant submitted that the Appeals Committee had breached the provisions of section 8 (7) of the Land Disputes Tribunals Act.

That sub-section is worded as follows:-

“After giving each party an opportunity to state his case the Appeals Committee shall determine the appeal giving reasons for its decision.

Provided that the Committee may in its discretion permit the party appealing to reply to the other party’s submission if that submission contains any new matter not previously introduced at the hearing or on the appeal.”

It follows, that the Appeals Committee is obliged to give reasons for its decision.

The respondent contends that the Appeals Committee did give reasons for its decision. The reason it gave, as far as the respondent was concerned, was that the land in issue had been purchased.

I verified from the record that the Appeals Committee made a finding, in the following words;

“Following visit by elders it was established that appellant bought the land and should be given his land. Appeal allowed with costs.”

Clearly, therefore, the basis for the decision by the Appeals Committee was that the appellant before them had bought the land.

In my considered opinion, the Appeals Committee did, in its finding, give a reason for the decision it arrived at. Even though the Committee did not elaborate on the said reason, they were not obliged to do so.

The second issue raised by the appellant was that the Appeals Committee erred in allowing further evidence to be taken. It was the appellant’s submission that the Appeals Committee, being an appellate body, could only evaluate the evidence on record.

Therefore, as the Appeals Committee, herein, visited the land which was the subject matter of appeal, it violated the Act, so submitted the appellant.

It was submitted that if the Appeals Committee wished to do more than evaluate the evidence recorded before the Land Disputes Tribunal, it could only have ordered for a retrial.

Thirdly, the appellant submitted that the sale of the land in issue was the subject matter of consent from the Land Control Board. In this case, the consent is said to have been obtained irregularly and was thus null and void.

In any event, even if consent had been obtained, the appellant says that it was still null and void, as it was obtained after the lapse of more than 6 months from the date of the contract.

Finally, the appellant submitted that the Appeals Committee had no authority to determine that the respondent had bought land, as the Land Disputes Tribunals Act does not empower the tribunals to adjudicate on contracts.

For those reasons, I was invited to allow the appeal, and thus set aside the decision of the Appeals Committee.

In answer to the appeal, the respondent submitted that it was frivolous and vexatious.

As far as the respondent was concerned, the appellant’s claim before the Vihiga Land Disputes Tribunal was for an order compelling the respondent to transfer the suit land back to him.

It is the understanding of the respondent that the suit land, SOUTH MARAGOLI/MAGUI/724, belonged to Jotham Govoga, who was the father to the appellant. It is the further understanding of the respondent that the appellant had asserted that his father could not sell the suit land without the consent of the appellant.

However, the respondent believes that the appellant had no interest in the suit land which could bar his father from selling the said land.

Notwithstanding the respondent’s view, that the appellant had no legal capacity to bar his father from selling the suit land, the appellant went ahead to sue both the respondent and the appellant’s own father.

In those circumstances, the respondent feels that the appellant’s initial claim before the Vihiga Land

Disputes Tribunal, did not fall under section 3 of the Land Disputes Tribunal Act. Indeed, it is the respondent's submission that from the outset, the appellant's claim was an abuse of section 3 of that statute.

That section reads as follows:-

“(1) Subject to this Act, all cases of a civil

nature involving a dispute as to –

(a) the division of, or the determination of

boundaries to land, including land held

in common;

(b) a claim to occupy or work land; or

(c) trespass to land, shall be heard and

determined by a Tribunal established

under section 4.”

From the record of the proceedings before the Vihiga Land Disputes Tribunal it is evident that the parties herein are neighbours.

The Tribunal's report, after they had visited the farm on 3rd July 1996, was to the effect that the respondent herein had trespassed onto the appellant's land.

However, from subsequent proceedings before the said Tribunal it becomes clear that the father to the appellant had entered into a contract with the respondent, pursuant to which the respondent would buy the suit land.

To that end, it is common ground that the Agreement was executed between the respondent and JOTHAM GOVOGA, the appellant's father. Thereafter, the respondent paid some money towards the purchase price. But the appellant raised an objection to the sale.

According to the appellant's father, once his son had raised an objection to the sale of the suit land, the sale fell through.

On the other hand, the respondent took possession of the suit land, and proceeded to put up some developments thereon.

In order to carry on with his said activities on the suit land, the respondent is accused of having destroyed the appellant's fencing and crops.

Having heard the case, the Tribunal ordered the respondent to remove the fencing he had put up on the farm. He was also to remove the latrine which he had constructed, and his son's house.

Meanwhile, the father to the appellant was to refund Kshs.5,000/= to the respondent.

And, ultimately, the respondent was ordered to pay Kshs.137,000/= as compensation to the appellant, for the “damage and occupancy of the land”, plus costs of the case.

When the respondent herein challenged that decision, the Appeals Committee reversed the decision of the

Vihiga Land Disputes Tribunal. As I stated earlier herein, the Appeals Committee made a finding that the respondent herein had bought the suit land.

As far as the respondent is concerned, the Appeals Committee was not required to look at the legality of the Agreement for sale.

To my mind, it is not possible, in law, for a person to make a conclusive adjudication on the issue of sale or purchase of land, without delving into the legality thereof. If any person concluded that there had been a purchase of land, yet certain essential legal requirements had not been met, the conclusion would be without foundation.

It is my considered opinion that it is because of the legal requirements in establishing whether or not contracts had been validly executed and given effect, that contractual matters do not fall within the jurisdiction of the Land Disputes Tribunals.

If an Agreement of Sale was in relation to Agricultural land, one of the requirements is that there should be a consent from the Land Control Board of the area within which the subject matter is situated. Such consent should be given within 60 days of the date of the contract in issue.

Those legal requirements are what, amongst other things, determine the legality of the contracts for sale.

Since, the Land Disputes Tribunals do not have jurisdiction to determine issues of contract, it would follow that the said Tribunals really have no reason to delve into the requirements of the legality or otherwise of contracts.

By the same token, neither the Vihiga Land Disputes Tribunal nor the Provincial Appeals Committee, Western Province had jurisdiction to determine the question of ownership of the suit land.

As regards the taking of new evidence, the proviso to section 8(7) of the Land Disputes Tribunals Act appears to imply that the respondent may, at the hearing of the appeal before the Appeals Committee, make submissions which contain;

“any new matter not previously introduced at the hearing or on the appeal.”

And if the respondent made use of that window to introduce new matters, the appellant may be permitted, at the discretion of the Appeals Committee, to reply to the respondent’s submissions.

In the case before me, there is no indication at all that the respondent before the Appeals Committee had raised any new matter, which had not been raised at the hearing before the Vihiga Land Disputes Tribunal. Indeed, there is absolutely no indication that the parties before the Appeals Committee made any submissions.

The record shows that the Appeals Committee read the record of the proceedings before the Land Disputes Tribunal. The said record was then confirmed to be correct, presumably by the two parties before the Committee.

The said Committee then indicated that there was a need to visit the site, for further evidence.

The elders visited the suit land on 7th June 2001. Immediately after the said visit, the Appeals Committee set the Ruling date, as 18th June 2001.

On the scheduled date, the Committee delivered its verdict, which has been set out earlier herein. Although I have made a finding that the Committee gave a reason for its decision, I nonetheless feel obliged to point out that the reason itself is not self-explanatory. I say so because it is not clear how the persons who visited the suit land were able to establish that the appellant before the Appeals Committee had bought land.

In my understanding, the fact of whether or not land had been bought is not something that is verifiable through a visit to the land.

It therefore follows that although reasons need not be as elaborate as those expected from Judicial Officers, the Appeals Committees should strive to provide a record which is self explanatory. For instance, there should be an indication if during a visit, the parties to the dispute were present, and if they said something.

As things stand in this case, the Appeals Committee did make up its mind that further evidence was necessary. However, this court has no idea what nature of evidence was deemed necessary, or if the said evidence was obtained, and if so, from whom.

Another issue of concern, but which was not raised by either of the parties before me, is that whereas there were 3 parties before the Vihiga Land Disputes Tribunal, there appears to have been only 2 parties before the Appeals Committee.

The father to the appellant herein did not participate in the proceedings before the Appeals Committee. Yet orders had been made, directing him to pay some money back to the respondent herein.

As the respondent was ordered to vacate the suit land, the question that remained outstanding is whether he would be obliged to vacate whether or not he was refunded the money which he had paid to the appellant's father.

For that reason, the father to the appellant ought to have been a party before the Appeals Committee.

That is even more so because the Appeals Committee held that the respondent herein bought the suit land. Obviously, that begs the question whether or not the respondent had paid Kshs.5,000/= or Kshs.11,000/=.

Whilst still on the issue of contract, it still remains to be ascertained how the father to the appellant was contracting to sell the suit land to the respondent, if as the appellant said to the Vihiga Land Disputes Tribunal, he (the appellant) was the registered owner of the land. On the other hand, if the father to the appellant was the owner of the land, what did the appellant herein mean when he said that he was the registered owner?

Those questions merely illustrate how intricate the issues of contract are. It is little wonder therefore that Parliament, in its wisdom, excluded contractual issues from the Land Disputes Tribunals.

In the final analysis, I find and hold that the Appeals Committee and the Vihiga Land Disputes Tribunal had no jurisdiction to determine the issue of ownership, which is pegged to contractual issues. In the event, the appeal is allowed. The decision of the Provincial Appeals Committee in Case No. 78 of 1998 is set aside. Also the decision of the Vihiga Land Disputes Tribunal is set aside.

As neither of the parties is ultimately a winner, I order that each party should bear his own costs.

Dated, Signed and Delivered at Kakamega, this 29th day of September, 2008.

FRED A. OCHIENG

J U D G E